

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

WILMARY SANTOS-SANTOS

Plaintiff

CIVIL NO. 11-1072 (PAD)

v.

PUERTO RICO POLICE DEPARTMENT
et al.

Defendants

MAGISTRATE JUDGE REPORT AND RECOMMENDATION

I. PROCEDURAL BACKGROUND

Plaintiff Wilmary Santos-Santos, a policewoman, first filed a Complaint against defendants Reynaldo Torres-Centeno (Director of the Caguas Strike Force of the Police of Puerto Rico (PRPD)), Gregorio Merced-Vázquez (Director of the Police of Puerto Rico (PRPD) in the Caguas Region), William Ruiz-Borras (commander of the Caguas Criminal Investigation Corps Division (CIC)), Miguel A. Santiago-Rivera (Director of the Caguas Criminal Investigation Corps), the Commonwealth of Puerto Rico and the Puerto Rico Police Department on January 212, 2011 (Docket No. 1 at 5-6) alleging retaliatory and discriminatory actions under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. and 42 U.S.C. § 2000e-3(1); violations under 42 U.S.C. § 1983, Conspiracy Claims under

1 CIVIL 11-1072 (PAD)

2

3 42 U.S.C. §§ 1985, 1988, violation of the Whistleblower Protection Act of 1989
4 (which is not applicable in this case, see 5 U.S.C. § 2302, and violation of rights
5 under the Fourth and Fourteenth Amendments of the United States Constitution
6 (Docket No.1, pp. 1-2). Supplemental claims were also included in the complaint.
7 Defendants answered the complaint (Docket No. 11) and raised an affirmative
8 defense that plaintiff had failed to state a claim upon which relief could be granted
9 and that co-defendants had acted at all times according to law, in good faith and
10 within the established framework of their authority and duties. (Docket No. 11,
11 p. 7, ¶¶ 1, 6).

12 Subsequently, defendants filed a Motion for Summary Judgment (Docket No.
13 25) for the court to dismiss the complaint because plaintiff lacked the factual
14 grounds to support her claims (Docket No. 25, p. 1). On August 9, 2012, the
15 motion was partially granted in a painstakingly written order (Docket No. 58),
16 leaving only the Title VII and Act 115 allegations as the only surviving claims. The
17 Title VII retaliation claims brought against individual defendants Gregorio Merced-
18 Vázquez, Reynaldo Torres-Centeno, William Ruiz-Borrás and Miguel A. Santiago-
19 Rivera in their personal capacities, and the Title 115 claims brought against
20 William Ruiz-Borrás were eventually dismissed as well. (Docket No. 83).

21
22 Following the court's instructions of August 9, 2012, Plaintiff filed a Response
23 in Opposition to the Motion for Summary Judgment on August 27, 2012, related
24
25

26

1 CIVIL 11-1072 (PAD)

3

2
3 to the claims under Title VII and Act 115 (Docket No. 68) stating that defendants'
4 had not met their burdens for the court to grant a summary judgment in their
5 favor (Docket No. 68, pp. 23-24) since there was existing issue regarding the
6 reasons given by defendants for plaintiff's transfer (Docket No. 69, pp. 2-13).
7

8 On May 6, 2014, the court authorized the defendants to file a Second Motion
9 for Summary Judgment based on the new authority of Univ. of Tex. Sw. Med. Ctr.
10 v. Nassar, 133 S. Ct. 2517 (2013).

12 On June 9, 2014, defendants filed a Second Motion for Summary Judgment
13 (Docket No. 133), based upon the Supreme Court's decision in Univ. of Tex. Sw.
14 Med. Ctr. v. Nassar, 133 S. Ct. 2517, which provides that the "but-for" causation
15 standard must be applied to retaliation claims. Consequently, the defendants
16 argue that plaintiff has defeated her claim for retaliation by contending two
17 separate, discrete and distinctive conducts from her that caused the retaliation
18 suffered by her. (Docket No. 133, p. 3). In her Response to the Motion for
19 Summary Judgment (Docket No. 141) plaintiff alleged that such interpretation was
20 a misconstruction of the central holding in Univ. of Tex. Sw. Med. Ctr. v. Nassar,
21 133 S. Ct. 2517 (Docket No. 141, p. 14); since the plaintiff does not need to prove
22 that engaging in the protected activity was the sole factor motivating the adverse
23 employment action, "but that 'but for' the protected activity she would not have
24 faced adverse employment action." (Docket No. 141, p. 16). Plaintiff also makes
25
26
27
28

1 CIVIL 11-1072 (PAD)

4

2

3

a claim that even though defendants might provide a basis for "the rationale
4 behind the treatment [...] when the facts support plausible but conflicting
5 inferences on a pivotal issue in the case" a motion for summary judgment cannot
6 be granted. (Docket No. 141, p. 16).

7

Having considered the statements of the parties and their argument, I
8 recommend that the motion for summary judgment be granted and that the court
9 enter the following

10

II. FINDINGS OF FACT

11

1. Plaintiff Wilmary Santos-Santos started working for the Puerto Rico Police
12 Department on February 1, 1994. (Docket No. 26, p. 30, ¶134; Docket No. 69,
13 p. 16, ¶134-135).

14

2. On January 15, 2008 she co-signed a complaint issued by agent Sofía
15 Figueroa Rossy against Sergeant Simara Torres on grounds of sexual harassment.
16 (Docket No. 127, p. 5), upon which she started receiving hostile treatment and
17 negative attitudes from Simara Torres and co-defendants Reynaldo Torres
18 Centeno, Gustavo Collazo and Miguel Santiago. (Docket No. 127, p. 6).

19

3. In 2009 she began working for the Strike Force Division in the Caguas
20 precinct. (Docket No. 1, pp. 7-8, ¶16). That same year, defendant Lt. Torres
21 Centeno recommended her for a promotion to the rank of Sergeant. (Docket No.
22 141, p. 5).

23

24

1 CIVIL 11-1072 (PAD)

5

4. In March 2010 fellow coworkers, agents María Mercedes Figueroa and
5 Andy Acevedo, wrote memos complaining against comments made by plaintiff to
6 agent Acevedo's common-law wife, agent and coworker Sofía Figueroa regarding
7 a supposed affair between the two of them. (Docket No. 134, p. 13, ¶41 and 43,
8 pp. 16-17, ¶ 55-56). Defendants claim that said comments caused a disruption
9 among the relationship between the members of the team (Docket No. 134, p. 12,
10 ¶39), including concerns about their safety since they were all police officers and
11 therefore armed. (Docket No. 134, pp. 14 and 21, ¶ 46 and 72).

13
14 5. Lt. Reynaldo Torres Centeno, director of the Caguas Strike Force, drafted
15 a memo addressed to Lt. Col. Gregorio Merced, director of the Caguas area, asking
16 him to investigate. (Docket No. 134, p. 20, ¶ 69). Lt. Col. Merced interviewed
17 various agents and determined that due to the disruption caused, the safest
18 alternative was to transfer plaintiff back to the C.I.C. from where she had been
19 brought. (Docket No. 134, pp. 20-21, ¶ 70-72).

21
22 6. In April 2010, plaintiff filed a complaint to Lt. Col. Merced, against co-
23 defendant Lt. Torres Centeno, regarding his and other officers' illegal use of official
24 vehicles for personal matters and other illegal activities. (Docket No. 141, p. 2 and
25 Docket 142; pp. 7, 11; ¶ 49, 77).

26
27 7. On May 2, 2010 plaintiff had been assigned to the front desk and was
28 excluded from a Strike Force meeting and an operative action coordinated by Lt.

1 CIVIL 11-1072 (PAD)

6

2
3 Torres. (Docket No. 141, p. 7). Defendants claim that she had never been chosen
4 nor assigned to the operation, and had merely participated in related activities
5 beforehand. (Docket No. 134, pp. 7-9, ¶18-26).

6
7 8. On May 14, 2010 Lt. Col. Gregorio Merced and Lt. Reynaldo Torres
8 Centeno signed an order transferring plaintiff back to the C.I.C. (Docket No. 134,
9 p. 20, ¶67 and Docket No. 141, p. 7).

10
11 9. Plaintiff filed a complaint against her transfer claiming that upon joining
12 the Strike Force, the group was informed that if any member was to be removed
13 they would be returned to the division they originally came from. In plaintiff's case
14 this was the Special Arrests Division, and not the Property Division she had now
15 been assigned to. (Docket No. 69, p. 14, ¶ 116). Defendants note that the
16 Special Arrests Division had no need for extra personnel (Docket No. 134, p. 30,
17 ¶113), contrary to the needs of the Property Division (Docket No. 134, p. 29,
18 ¶111).

19
20 10. Upon joining the Property Division, plaintiff requested to be assigned to
21 the night shift, with the understanding that she would have weekends off.
22 (Docket No. 141, p. 8). However, changes to her schedule led to her having to
23 work during some weekends. Plaintiff claims that she was the only officer whose
24 schedule was altered in such a way, contrary to the pre-existing arrangement
25 (Docket No. 141, p. 10), while defendants claim that there is no law or regulation
26
27
28

1 CIVIL 11-1072 (PAD)

7

2
3 of the Puerto Rico Police Department that recognizes the right to have weekends
4 off if an officer works the night shift. (Docket No. 134, pp. 31-32, ¶ 121).

5
6 11. Following her official complaint and the press reports covering it, plaintiff
7 claims that she has continued to suffer from various incidents of retaliation.
8 (Docket No. 141, p. 12).

9
10 III. SUMMARY JUDGMENT STANDARD
11

12 A summary judgment can only be granted "if there is no genuine dispute as
13 to any material fact and the moving party is entitled to judgment as a matter of
14 law. Fed. R. Civ. P. 56(a); Gerald [v. University of Puerto Rico], 707 F.3d [7], at
15 16 [(1st Cir. 2013).]" Hicks v. Johnson, 755 F.3d 738, 743 (1st Cir. 2014). To
16 properly defeat a motion for summary judgment "[o]nce a properly supported
17 motion has been presented, the opposing party has the burden of demonstrating
18 that a trial-worthy issue exists that would warrant the Court's denial of the motion
19 for summary judgment. For issues where the opposing party bears the ultimate
20 burden of proof, that party cannot merely rely on the absence of competent
21 evidence, but must affirmatively point to specific facts that demonstrate the
22 existence of an authentic dispute. See Suárez v. Pueblo Int'l., Inc., 229 F.3d 49,
23 53 (1st Cir. 2000)." Maisonet v. Genett Grp., Inc., 863 F. Supp. 2d 138, 141-42
24 (D.P.R. 2012). "[C]onclusory allegations, empty rhetoric, unsupported
25 speculation, or evidence which, in the aggregate, is less than significantly
26
27
28

1 || CIVIL 11-1072 (PAD)

8

probative' will not suffice to ward off a properly supported summary judgment motion. Rogan v. City of Boston, 267 F.3d 24, 27 (1st Cir. 2001)." Nieves-Romero v. United States, 715 F.3d 375, 378 (1st Cir. 2013); see Rivera v. Puerto Rico Elec. Power Authority, 4 F. Supp. 3d 342, 348 (D.P.R. 2014).

With this as background, and the above proposed Findings of Fact, I recommend that the court enter the following

IV. CONCLUSIONS OF LAW

1. Following the Court's partial granting of defendants' motion for summary judgment, the only surviving claims are under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq., and P.R. Act No. 115 of December 20, 1991, P.R. Laws Ann. tit. 29, § 194a(a). In Garayalde-Rijos v. Municipality of Carolina, 747 F.3d 15, 24 (1st Cir. 2014) the Court stated regarding retaliation claims:

Title VII bars employers from retaliating against an applicant or employee because she 'has opposed any practice made an unlawful employment practice by this subchapter, or because [s]he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.' 42 U.S.C. § 20003-3(a). To establish a prima facie case of retaliation, a plaintiff must show (1) she engaged in protected conduct; (2) she suffered an adverse employment action; and (3) that a 'causal nexus exists between the protected [conduct] and the adverse action.' Ponte v. Steelcase Inc., 741 F.3d 310, 321 (1st Cir. 2014); id. (noting that plaintiff must prove but-for causation (citing Univ. of Tex. Sw. Med. Ctr. v. Nassar,

1 CIVIL 11-1072 (PAD)

9

2

3

4

__U.S.__, 133 S. Ct. 2517, 2534 . . .)).

5

6

Regarding claims under Law 115 of Puerto Rico, the Court has stated that:

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

Law 115 prohibits employers from discriminating against employees for 'offer[ing] or attempt[ing] to offer, verbally or in writing, any testimony, expression or information before a legislative, administrative or judicial forum in Puerto Rico.' Uphoff Figueroa v. Alejandro, 597 F.3d 423, 432-33 (2010) (quoting 29 L.P.R.A. § 194a(a)). To state a viable claim under Law 115, '[e]mployees must establish they engaged in activity protected under Law 115 and then suffered discrimination at work.' Id. (citing Vélez v. Janssen Ortho, LLC, 467 F.3d 802, 809 (1st Cir. 2006))."

Pabón-Ramírez v. MMM Health Care, 2013 WL 1797041 (D.P.R. Apr. 29, 2013).

2. In the case of Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, the Supreme Court stated that "Title VII retaliation claims must be proved according to traditional principles of but-for causation [...] This requires proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer." Id. at 2533; see Moreta v. First Transit of PR, Inc., __F. Supp.2d__, 2014 WL 3378672 at *5 (D.P.R. July 9, 2014). According to defendants, plaintiff defeated her Title VII claim by "articulat[ing] with the same force and strength two different causes, one protected under Title VII and one which is not, as the causes of the same alleged retaliatory action she experienced." (Docket No. 133, p. 11). It is the defendants' view that by arguing two reasons behind the retaliatory actions suffered, plaintiff is failing to meet the but-for cause standard required, particularly when one (her participation in the complaint against

1 CIVIL 11-1072 (PAD)

10

3 Sgt. Simara Torres) is covered by Title VII, while the other (the denunciation of
4 Lt. Reynaldo Torres's illegal activities regarding police property) is not. (Docket
5 No. 133, pp. 9-10).

7 However this Court stated in Fontanillas-Lopez v. Morel Bauza Cartagena &
8 Dapena LLC, 995 F. Supp. 2d 21, 51 (D.P.R. 2014) that:

10 [P]rotected conduct under Title VII's anti-retaliation provision is
11 not limited to filing an administrative charge of discrimination. It
12 expressly prohibits retaliation for 'oppos[ing] any practice made an
13 unlawful practice by Title VII.' Petrarca v. Southern Union Co., No.
14 04-310S, 2007 WL 547690 at 12 (D.R.I. 2007) (citing 42 U.S.C.
15 § 2000e-3(a)). See also Pérez-Cordero v. Wal-Mart Puerto Rico,
16 Inc., 656 F.3d 19, 31 (1st Cir. 2011). [...] 'The law protects
17 employees in the filing of formal charges of discrimination as well
18 as in the making of informal protests of discrimination, 'including
making complaints to management, writing critical letters to
customers, protesting against discrimination by industry or society
in general, and expressing support of co-workers who have filed
formal charges.' [Matima v. Celli, 228 F.3d 68, 78-79 (2d Cir.
2000)].

19 3. Regardless of whether or not plaintiff's accusations made against Lt.
20 Reynaldo Torres are protected under Title VII retaliation claims, following the
21 decision in Univ. of Tex. Sw. Med. Ctr. v. Nassar, *supra*, the First Circuit found that
22 "[r]etaliantory termination claims based on circumstantial evidence are evaluated
23 using the McDonnell Douglas burden-shifting framework. Gerald [v. University of
24 Puerto Rico, 707 F.3d 7, 24 (1st Cir. 2013)]. To make a *prima facie* showing of
25 retaliation, the plaintiff must show that she engaged in protected conduct, that she
26 suffered an adverse employment action, and that a causal nexus exists between
27 28

1 CIVIL 11-1072 (PAD)

11

2
3 the protected activity and the adverse action. Id." Ponte v. Steelcase Inc., 741
4 F.3d 310, 321 (1st Cir. 2014); see Ramirez-Rodriguez v. Boehringer Ingelheim
5 Pharmaceuticals Inc., 425 F.3d 67, 84 (1st Cir. 2005); see Moreta v. First Transit
6 of PR, Inc., ___ F. Supp.2d___, 2014 WL 3378672 at *6; Serrano v. Donahue,
7 2014 WL 4924434 at *12 (D.P.R. September 30, 2014).

8
9
10 4. In view of the framework established in McDonnell Douglas v. Green, 411
11 U.S. 792, 93 S.Ct. 1817 (1973) "the plaintiff must first establish a *prima facie* case
12 of discrimination. Johnson [v. University of Puerto Rico, 714 F.3d 48, 53 (1st Cir.
13 2013)]. If [s]he succeeds, an inference of discrimination arises, and the burden
14 of production shifts to the defendant to produce evidence that the challenged
15 employment action was taken for a legitimate, non-discriminatory reason. Id. at
16 53-54. If the employer supplies such evidence, the plaintiff is left with the burden
17 to prove 'by preponderance of the evidence that the employer's proffered reason
18 is pretextual and that the actual reason for the adverse employment action is
19 discriminatory.' Id. at 54." Ahmed v. Johnson, 752 F.3d 490, 495-96 (1st Cir.
20 2014); see Roman v. Potter, 604 F.3d 34, 39 (1st Cir. 2010).

21
22
23
24 5. A plaintiff has to prove via preponderance of evidence that the reason is
25 a pretext, which "can be shown by such weaknesses, implausibilities,
26 inconsistencies, incoherencies, or contradictions in the employer's proffered
27 legitimate reasons for its actions that a reasonable factfinder could rationally find
28

1 CIVIL 11-1072 (PAD)

12

2

3

them unworthy of credence and hence infer that the employer did not act for the
4 asserted non-discriminatory reasons.' Gómez-González [v. Rural Opportunites,
5 Inc., 626 F.3d 654, 662-663 (1st Cir. 2010)]]." Adamson v. Walgreens Co., 750
6 F.3d 73, 79 (1st Cir. 2014).

7

6. Plaintiff "must offer 'some minimally sufficient evidence, direct or indirect,
9 both of pretext and of [...] discriminatory animus.' Acevedo-Parrilla v. Novartis
10 Ex-Lax, Inc., 696 F.3d 128, 140 (1st Cir. 2012). '[M]ere questions regarding the
11 employer's business judgment are insufficient to raise a triable issue as to pretext.'

12 Id." Pearson v. Massachusetts Bay Transp. Auth., 723 F.3d 36, 40,41 (1st Cir.
13 2013). As Univ. of Tex. Sw. Med. Ctr. v. Nassar, supra at 2533, states "Title VII
14 retaliation claims... require[] proof that the unlawful retaliation would not have
15 occurred in the absence of the alleged wrongful action or actions of the employer".
16 See also Fontanillas-Lopez v. Morel Bauza Cartagena & Dapena LLC, 995 F. Supp.
17 2d at 51. The less stringent standard of plaintiff's having to prove a motivating
18 factor has been discarded.

19

20

21

22

23

24

25

26

27

28

7. In the present case, defendants claim that comments made by plaintiff
had caused an uncomfortable environment within the Strike Force, and that in
order to prevent any further disruption it was decided to transfer her. (Docket
133, p. 15). They alleged that the transfer was not a demotion; she was not fired
and her salary had not been reduced. (Docket No. 133, p. 19). Accordingly,

1 CIVIL 11-1072 (PAD)

13

2
3 defendants have made a sufficient *prima facie* showing of legitimate reasons for
4 transferring plaintiff, which would defeat not only her Title VII but her Law 115
5 claims as well. "In order to establish a *prima facie* case under Law 115, a plaintiff-
6 employee must establish that he or she '(a) participated in an activity protected
7 by [P.R. Laws Ann. tit 29,]§§ 194 et seq. and (b) was subsequently discharged.'

8
9
10 Lupu v. Wyndham El Conquistador Resort and Golden Door Spa, 524 F.3d 312,

11 313 (1st Cir. 2008); Uphoff Figueroa v. Alejandro, 597 F. 3d 423 (1st Cir. 2010)."

12 Miranda v. Deloitte LLP, 922 F. Supp. 2d 210, 224 (D.P.R. 2013). "A showing of
13 protected activity closely followed by an adverse action is indirect proof of a causal
14 connection between the employment action and the protected activity. . . . Plaintiff
15 can present other sources of circumstantial evidence that can substantiate a
16 retaliation claim. . ." Farb v. Pérez-Riera, 957 F. Supp. 2d 129, 142 (D.P.R.
17 2013).
18

19
20 8. In order to properly defeat defendants' reasons for the supposed
21 retaliatory actions taken against her, plaintiff had to provide the necessary
22 evidence to demonstrate that such actions were pretext, beyond a mere response
23 to their allegations. See Pearson v. Massachusetts Bay Transp. Auth., 723 F.3d
24 36, 40-41 (1st Cir. 2013); Acevedo-Parrilla v. Novartis Ex-Lax, Inc., 696 F.3d 128,
25 140 (1st Cir. 2012). Plaintiff has not been able to show that defendants' actions
26 against her involve discriminatory work practices nor that the reasons behind them
27
28

1 CIVIL 11-1072 (PAD)

14

2

3

were mere pretext. Plaintiff has not been fired nor been demoted and her salary
4 has suffered no adverse change. Any business decision made regarding her
5 employment has been legitimately explained by defendants, and no proof has been
6 provided that an action that goes against any existing statute or regulation has
7 been taken. There is neither a scintilla nor an inkling of information regarding
8 pretext in the reasoning.

9

10

V. CONCLUSION

11

12

In view of the above, I recommend that defendant's second motion for
13 summary judgment (Docket No. 133) be granted, that the court enter an order
14 dismissing the complaint.¹

15

16

17

18

19

20

21

22

23

24

25

26

27

28

Under the provisions of Rule 72(d), Local Rules, District of Puerto Rico, any
party who objects to this report and recommendation must file a written objection
thereto with the Clerk of this Court within fourteen (14) days of the party's receipt
of this report and recommendation. The written objections must specifically
identify the portion of the recommendation, or report to which objection is made
and the basis for such objections. Failure to comply with this rule precludes
further appellate review. See Thomas v. Arn, 474 U.S. 140, 155, 106 S. Ct. 466

¹Marielia Isla Torres, a third-year student at University of Puerto Rico School of Law, provided substantial assistance in researching and preparing this report and recommendation.

1 CIVIL 11-1072 (PAD)

15

2
3 (1985); Sch. Union No. 37 v. United Nat'l Ins. Co., 617 F.3d 554, 564 (1st Cir.
4 2010); Davet v. Maccorone, 973 F.2d 22, 30-31 (1st Cir. 1992); Paterson-Leitch
5
6 Co. v. Mass. Mun. Wholesale Elec. Co., 840 F.2d 985 (1st Cir. 1988); Borden v.
7
8 Sec'y of Health & Human Servs., 836 F.2d 4, 6 (1st Cir. 1987); United States v.
9
10 Vega, 678 F.2d 376, 378-79 (1st Cir. 1982); Wallace v. State of New Hampshire,
11 2010 WL 520904 at *2 (D. N. H. Feb. 9, 2010).

12
13 In San Juan, Puerto Rico this 24 day of October, 2014.

14
15 S/JUSTO ARENAS

16
17 United States Magistrate Judge

18
19
20
21
22
23
24
25
26
27
28